



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1966 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

SIPROSE ATIENO MULAMA.....CLAIMANT

VERSUS

THE BOARD OF GOVERNORS

NGARA GIRLS HIGH SCHOOL.....1ST RESPONDENT

ASSUMPTA NDUNGE MUNYASYA.....2ND RESPONDENT

JUDGEMENT

The Claimant filed her Memorandum of Claim on 21st November 2011 contesting her termination and seeking the following reliefs:

1. The Respondents to pay the Claimant gratuity (service), notice and leave as qualified herein below:-

- i. Gratuity(service) at the rate of 30 days per year worked
 (one month salary for each complete year)
 33,085 x 8 years Kshs.264,680
- ii. Payment in lieu of Notice (one month salary)..... Kshs.33,085
- iii..... Accumulated Leave 117 days
 (33,085 x 117/30)..... Kshs.129,031.50
- iv..... Year 2009 leave 33,085 & year 2010
 leave 33,085.....Kshs.66,170
- v.. Salary Arrears 2008 and 2009 = 31,710 + 63,420..... Kshs.95,130
- vi. Leave Travel Allowance 2009 and 2010..... Kshs.2,000
- vii..... Half salary February, March, April and May 2010
 (12,947 x 4) Kshs.51,788
- viii.....Refund of salary deduction for

February 2010..... Kshs.5,515

Total Amount Kshs.647,399.50

2. Respondents to pay the Claimant reasonable compensation for illegal and unlawful termination of employment as this Honourable Court may determine.
3. Respondents to pay the costs of this suit with interest.
4. Any other order and/or relief that this Honourable court may deem just and expedient to grant.

The Respondent filed its Memorandum of Response and Counter-Claim on 10th July 2012 in which it denies the allegations in the Memorandum of Claim. In the Counter Claim the Respondent avers that the Claimant owes the Respondent a total of Kshs.79,404.00 computed as follows:

- i. 23 working days in the running from 23rd June 2009
to 24th November 2009..... Kshs.25,365.00
- ii. 24 working days in the period running between
24th November 2009 to 30th April 2010..... Kshs.54,039.00

In her Reply to the Respondent's Memorandum of Reply and Counterclaim Claimant denied the allegations stated therein as being an abuse of the court process with no legal basis.

Claimant's Case

The Claimant avers that she was employed by the 1st Respondent as the School Bursar on 1st April 2003. The Respondents vide a letter dated 24th June 2009 sent her on compulsory leave for 30 days and extended her leave by a further 30 days in its two letters dated 5th August 2009 and 15th September 2009 respectively. She was thereafter given off-duty days then interdicted by letters dated 2nd November 2009 and 23rd November 2009. She was eventually terminated from service vide the letter dated 18th May 2010.

The Claimant testified that she was not informed of the reasons for being sent on compulsory leave. That on 23rd June 2009 the 2nd Respondent summoned her to appear before the board the following day. She contended that she appeared before the Board on 24th June 2006 but the issue on her work performance was not raised. The meeting raised a question of a supplier who had given money for a Harambee. She did not agree with the reasons for her interdiction and was never given an opportunity to appear before the Board to defend herself on those reasons for interdiction before her employment was terminated.

The Claimant further testified that the Report produced by the respondents was one which the Respondents had typed as the Auditors' report was what she had annexed to her reply to the Respondents Memorandum of Response. She testified that there was a discrepancy in these two reports as the Auditor's report stated that the Claimant was to explain the under cast as per the cashbook but what was produced by the Respondents states that the Claimant was to explain the difference as per the fees collected. The Claimant testified that the auditors themselves disputed the report when she met them 6th May 2015 the date this matter was scheduled for hearing but did not proceed. The Claimant testified that she is yet to receive her terminal dues as set out in her letter of termination.

In respect of the counter-claim the Claimant testified that she disputed the allegations therein since the Respondents are the ones who sent her on compulsory leave.

Respondent's Case

The Respondents admit that the Claimant was employed as a bursar on 1st April 2003 at a salary of Kshs.12,450.00. The Respondents aver that the 1st Respondent realised that there was a serious slack in the Claimant's performance of her duties as follows:

- a. The Claimant persistently failed to prepare financial returns and to remit the same to the Ministry of Education on time.
- b. The financial documents were insufficiently prepared.
- c. The Claimant persistently flouted and contravened procurement procedures.

The Respondents aver that the Claimant was issued with a warning letter dated 5th May 2009. Subsequently, an audit was conducted for the period between 1st January 2009 to 31st May 2009 where an under cast of the fees collected was found totalling Kshs.478,102.00.

The Respondents further aver that the 1st Respondent summoned the Claimant to appear before the Board of Governors on 23rd June 2009 to

respond to the allegations made against her. The 1st Respondent made its decision to send the Claimant on compulsory leave, which was thereafter extended, 16 off days and eventually on annual leave. The Respondents contend that upon the 1st Respondent making its decision to interdict the Claimant, it called upon her to show cause why disciplinary action should not be taken against her. The Respondents aver that upon consideration of the explanation given by the Claimant in her undated letter the 1st Respondent in a meeting held on 8th May 2010 resolved to terminate the Claimant's employment.

Claimant's Submissions

The Claimant submitted that the Respondent seems to have been determined to make sure that the Claimant did not deliver and thus found a reason to terminate her employment. The Claimant submitted that she was never taken through an internal disciplinary process envisaged under Section 41 of the Employment Act.

The Claimant submitted that she had made an oral application to amend the payment in lieu of notice from one month to three months which she was entitled to including other claims in her Memorandum of Claim. The Claimant submitted that she had proved her case of unfair termination in accordance with Section 45 of the Employment Act and relied on the cases of **Moses Kaunda Moro v CMC Motors Group Ltd [2013] eKLR** and the case of **Onesmus Maroko v Cooperative Bank of Kenya Ltd [2014] eKLR**.

Respondents' Submissions

The Respondents submitted that the Claimant was terminated from Employment for a valid reason and the same was duly communicated to her. The Respondents further submitted that the Claimant was not entitled the payment of gratuity since she had not attained 10 years in service. In addition, that the Claimant had been paid one months' salary in lieu of notice and that the claims for salary arrears should fail since the Claimant had been paid the amounts due.

Determination

Issues for determination

- i. Whether the Claimant's termination was unfair.
- ii. Whether the Claimant is entitled to the reliefs sought.

Whether the termination of the claimant's employment was unfair

Unfair termination is provided in Section 45(1) and (2) of the Employment Act which provide as follows

45. Unfair termination

- (1) No employer shall terminate the employment of an employee unfairly.**
- (2) A termination of employment by an employer is unfair if the employer fails to prove—**
 - (a) that the reason for the termination is valid;**
 - (b) that the reason for the termination is a fair reason —**
 - (i) related to the employee's conduct, capacity or compatibility; or**
 - (ii) based on the operational requirements of the employer; and**
 - (c) that the employment was terminated in accordance with fair procedure.**

For termination to be fair there must be both valid reason as provided in Section 43 and fair procedure as provided in Section 41.

Section 45(4)(b) provides that termination of employment shall be unfair where it is found that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

In the minutes of the 1st respondent held on 23rd January 2010, it is observed as follows –

1. *“Members felt that at an officer cannot work well if there is lack of trust.*
2. *The members also said that as long as she is on interdiction, she cannot be replaced.*
3. *Therefore it was resolved that: -*

- a) *The bursar to be paid three months' salary in lieu of notice*
- b) *Terminate her services as from end of May 2010.*
- c) *After termination advertise for her job in Nation newspaper."*

The claimant testified that she was sent on compulsory leave for 30 days from 23rd June 2009. The compulsory leave was extended twice by letter dated 5th August 2009 and 15th September 2009. Thereafter she was sent on 16 days off duty by letter dated 2nd November 2009 and then on annual leave by letter dated 23rd November 2009. She was then interdicted by letter dated 25th January 2010. The interdiction was for an indefinite period.

The claimant testified that after responding to the interdiction letter, she received the letter of termination dated 18th May 2010 but terminating her employment from 9th May 2010 on grounds of poor performance. She was thus never given a hearing before termination of her employment on the grounds for which her employment was terminated.

From the foregoing it is evident that the termination of the claimant's employment was unfair both procedurally and substantively as there was no proof of valid reason as required in Section 43 of the Act and she was not subjected to fair procedure as required under Section 41 of the Act.

I therefore make a finding that the termination of the claimant's employment was unfair.

Remedies

According to the minutes of the Board in which the decision to terminate her employment was made, the Board resolved to pay the claimant three months' salary in lieu of notice. She is therefore entitled to the same based on her last gross salary of Kshs.33,085 as per payslip for January 2010. I thus award her Kshs.99,255. The claimant did not adduce any evidence to prove that she was entitled to gratuity or any accumulated leave not taken. The respondent admitted owing her Kshs.2,000 for leave travel allowance and Kshs.2,757 refund of salary deduction.

She is entitled to withheld salary from September 2009 to April 2010 at Kshs.12,947 per month being Kshs.103,576 and a further Kshs.8,963.30 from 1st to 18th May 2010 when the letter of termination was written.

Having been unfairly terminated and taking into account the manner in which the claimant was handled from the time of compulsory leave on 23rd June 2009 to 18th May 2010 when the letter of termination was written, it is my opinion that she is entitled to maximum compensation which I award her at Kshs.397,020 which I award her.

From the total award of Kshs.613,571.30 may be recovered the sum of Kshs.97,390.0 paid to Elimu SACCO and Kshs.24,957.90 paid from Income Tax (PAYE). This leaves a balance of **Kshs.491,304.30** which I award her.

The respondent shall pay the claimant's costs.

Interest shall accrue on the withheld salary from date of filing suit while the rest of the claim shall attract interest from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE